(1)

Supreme Court, U.S.
FILED

021204 FEB 6 2003

OFFICE OF THE CLERK

NO. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 2002

JUAN GARCIA ABREGO,
Petitioner,
vs.
UNITED STATES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MICHAEL PANCER*
105 West "F" Street
San Diego, CA 92101
(619) 236-1826

ROBERT J. WATERS
2115 Main Street
Santa Monica, CA 90405
(310) 399-3259

Counsel for Petitioner
JUAN GARCIA ABREGO

*Counsel of Record

83 pp

QUESTION PRESENTED FOR REVIEW

Whether Petitioner was denied his right to due process and equal protection of law, as guaranteed by the Fifth Amendment to the United States Constitution, when his timely appeal from the denial of his motion for new trial based upon newly discovered evidence, pursuant to Rule 33 (b)(1), Federal Rules of Criminal Procedure, was terminated because a certificate of appealability was not issued in a contemporaneous timely appeal from the denial of his motion pursuant to 28 USC §2255?

LIST OF PARTIES

1. United States of America
2. Juan Garcia Abrego

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

LIST OF PARTIES ii

OPINION BELOW 1

BASIS OF JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE AND FACTS 2

REASONS FOR GRANTING THE WRIT 6

Certiorari Should Be Granted and this Case Remanded for a Briefing Schedule to Be Ordered for Petitioner's Appeal from the Denial of His Motion for New Trial for Newly Discovered Evidence 6

CONCLUSION 17

TABLE OF AUTHORITIES

CASES — Page

Barefoot v. Estelle, 463 U.S. 880 (1983) 13

Bolling v. Sharpe, 347 U.S. 497 (1954) 15

Coppedge v. United States, 369 U.S. 438 (1962) 10, 12, 13

Douglas v. California, 372 U.S. 353 (1963) 15, 16

Evitts v. Lucey, 469 U.S. 387 (1985) 15, 16

Griffin v. Illinois, 351 U.S. 12 (1956) 15

Hardy v. United States, 375 U.S. 277 (1964) 11, 15

McKane v. Durston, 153 U.S. 684 (1894) 15

Rinaldi v. Yeager, 384 U.S. 305 (1966) 16

Ross v. Moffitt, 417 U.S. 600 (1974) 15

Slack v. McDaniel, 529 U.S. 473 (2000) 13, 14

United States v. Alvarado, 898 F.2d 987 (5th Cir. 1991) 9

United States v. Burnes, 668 F.2d 855 (5th Cir. 1982) .. 9

United States v. Garcia Abrego, 141 F.3d 142 (5th Cir. 1998) 3

United States v. Prescott, 221 F. 3d 686 (4th Cir. 2000)..... 9

United States v. Torres, 163 F.3d 909 (5th Cir. 1999) .. 9

United States v. Willis, 273 F.3d 592 (5th Cir. 2001) ... 9

STATUTES & CONSTITUTION

U.S. Const. Amendment V 2, 15, 16, 17

U.S. Const. Amendment XIV 15

28 USC §1254 2

28 USC §1291 ..... 2, 3, 7

28 USC §2253 ..... 8, 13

28 USC §2255 ..... passim

Rule 4 (a)(1), Fed. R. App. Pro. 8

Rule 4 (b)(1), Fed. R. App. Pro. 2, 3

Sup. Ct. Rule 10 7

Rule 27, Fed. R. App. Pro. 8

Fifth Circuit Rule 27.2.3 9

Rule 34, Fed. R. App. Pro. 8

Rule 33 (b), Fed. R. Crim. Pro. 1, 2, 7

OPINIONS BELOW

On June 7, 2002, Judge Ewing Werlein, Jr., in a Memorandum and Order, which appears in Appendix A to this Petition, denied Juan Garcia Abrego's timely motion for new trial based on newly discovered evidence and request for discovery (hereinafter motion for new trial) pursuant to Rule 33 (b)(1), Federal Rules of Criminal Procedure, and further denied his motion pursuant to 28 USC §2255. Judge Werlein additionally refused to issue a certificate of appealability with respect to the 2255 motion. On June 17, 2002, Mr. Abrego filed a Notice of Appeal from the District Court's Order and Final Judgment, which denied Mr. Abrego's 28 U.S.C. § 2255 motion and denied a certificate of appealability as to that decision. On July 29, 2002, Judge Werlein granted leave to file an amended notice of appeal, which appears in Appendix B to this Petition, clarifying that Juan Garcia Abrego was appealing both the denial of the motion for new trial and the denial of his motion pursuant to 28 USC §2255. By letter from the Clerk of the Court, dated August 5, 2002, which appears in Appendix C to this Petition, Mr. Abrego was notified that the various appeals filed in this matter were to proceed under Fifth Circuit Case Number 02-20723.

On October 7, 2002, Circuit Judge Harold R. DeMoss, Jr., denied a certificate of appealability regarding Petitioner's appeal from the denial of the 28 USC §2255 motion. Judge DeMoss' Order appears in Appendix D to this Petition. Subsequently, counsel for Petitioner was orally informed by Clerk Sutton of the United States Court of Appeals for the Fifth Circuit that the denial of the certificate of appealability terminated all of Petitioner's appeals, including his appeal of right from the denial of the motion for new trial. Thereafter,

on November 11, 2002, a panel of the United States Court of Appeals for the Fifth Circuit denied Petitioner's motion for reconsideration of the denial of a certificate of appealability. The panel's decision appears in Appendix E to this Petition.

Petitioner then moved for a briefing schedule for his appeals on his motion for new trial based on newly discovered evidence and Clerk Sutton responded in a letter to Petitioner's counsel, stating that the Fifth Circuit had issued its final ruling and no briefing schedule would issue. The January 30, 2003 letter from Clerk Sutton appears in Appendix C to this Petition.

BASIS OF JURISDICTION

Because the United States Court of Appeals for the Fifth Circuit erroneously refused to hear Petitioner's appeal of right from the district court's denial of his motion for new trial, this Court's jurisdiction is invoked under 28 USC §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment; 28 USC §1291; Rule 33 (b)(1), Federal Rules of Criminal Procedure; and Rule 4 (b)(1)(A)(i), Federal Rules of Appellate Procedure are set forth in Appendix F to this Petition.

STATEMENT OF THE CASE AND FACTS

Petitioner, Juan Garcia Abrego, respectfully prays that a Writ of Certiorari issue to review the decision of the United

States Court of Appeals for the Fifth Circuit that the denial of a certificate of appealability with respect to a petition pursuant to 28 USC §2255 has the effect of precluding the separate appeal from a final judgment denying a motion for a new trial, even though said judgment is appealable as a matter of right. Fed. R. App. P. 4 (b)(1)(A)(I); 28 USC §1291.

Petitioner was convicted of various marijuana, cocaine, and money laundering offenses and sentenced to multiple concurrent terms of life imprisonment on February 3, 1997. His convictions were affirmed on appeal in *United States v. Garcia Abrego*, 141 F.3d 142 (5th Cir. 1998) His petition for writ of certiorari from that decision was denied on October 5, 1998. 525 U.S. 878, 119 S.Ct. 182 (1998). His petition for rehearing was denied on November 30, 1998. 525 U.S. 1035, 119 S.Ct. 582 (1998).

On September 17, 1999, Petitioner filed timely motions for a new trial under Rule 33 (b)(1), Federal Rules of Criminal Procedure, and for collateral relief under 28 USC §2255. In support of these motions he alleged that he had learned that a primary prosecution witness, Carlos Resendez, had committed perjury during his trial. In addition, when Resendez falsely testified that he was not seeking the $2,000,000 reward for having arranged Petitioner's arrest, his perjury was known to the prosecution. In fact, the government had not only agreed to pay Resendez the $2,000,000 reward, it had also agreed to purchase all of Resendez's Mexican real estate holdings, provide Resendez and his family with U.S. citizenship, and secure employment for Resendez and his family and other financial incentives in return for Resendez's testimony against Petitioner.

In addition to alleging that Resendez had been instructed to untruthfully deny he had discussed the reward money with government agents, Petitioner also alleged that the government sought to conceal that Resendez's former mistress, Noema Quintanilla, had actually provided the information leading to Petitioner's arrest, and instructed Resendez to falsely testify that it was he who had provided the information. As a result of this misconduct, the jury was materially misled by perjured testimony that was known to, but not corrected by, the prosecution.

Petitioner initially submitted two declarations from investigator Manny Lopez in support of his petition. In his declarations, Mr. Lopez detailed a conversation that he had Carlos Resendez and provided information gained from six conversations with Resendez's Mexican attorney, Raquenel Villanueve-Fraustro. On June 7, 2002, after supplemental briefing by both sides and after additional declarations had been filed by Lopez and Villanueve-Fraustro, the District Court struck Lopez's declarations as hearsay, but accepted as true the allegations in Villanueve-Fraustro's declaration that prior to Petitioner's trial, the government entered an agreement with Resendez to: (1) purchase Resendez's properties in Mexico; (2) provide Resendez and his family with U.S. citizenship; (3) change Resendez's identity and provide him with personal protection; (4) purchase a house for Resendez in the United States; and (5) obtain employment for Resendez in the United States.

Although the District Court concluded that the suppressed information would have had impeachment value, it held that it was not "material" and refused to find that government had permitted Resendez to commit perjury. On this basis, the

District Court denied Petitioner's motions for new trial and for relief under 28 USC §2255. In that same Memorandum and Order, the District Court denied Petitioner a certificate of appealability regarding his 28 USC §2255 motion.

Petitioner filed a timely notice of appeal on June 17, 2002 [02-20723], and was ultimately granted leave to enlarge the time (until July 12, 2002) to file his Amended Notice of Appeal [02-20820] to clarify that he was appealing from both the denial of his motion for new trial[1/] and from the denial of his motion pursuant to 28 USC §2255.

In the United States Court of Appeals for the Fifth Circuit, the three case numbers assigned to Petitioner's appeals of the denial of both motions were combined into one case number, 02-20723. On October 7, 2002 his application for certificate of appealability was denied by a single judge. Having learned from Clerk Sutton that the appellate court's denial of his request for a certificate of appealability would be treated as terminating all the appeals combined under case number, 02-20723, Petitioner filed a motion for reconsideration, seeking to reinstate his appeal as of right from the motion for a new trial. Petitioner sought to clarify that the denial of the certificate of appealability only applied to the appeal of his petition pursuant to 28 USC §2255 and that a briefing schedule would have to be established for the appeal of the denial of his motion for a new trial.

[1/] In his request to extend time to file an amended notice of appeal, Petitioner also submitted a Proposed Second Notice of Appeal, which was given Fifth Circuit No. 02-20823.

This motion for reconsideration was opposed by the government, which argued that the denial of the certificate of appealability precluded Petitioner from appealing the denial of his motion for a new trial. On November 11, 2002, a panel of the United States Court of Appeals for the Fifth Circuit summarily denied the motion for reconsideration. The order never mentioned that Petitioner was appealing the denial of a motion for new trial. *See* Appendix E.

Petitioner then moved for a briefing schedule with respect to his appeals from the denial of his motion for new trial, but his counsel was informed by letter from Clerk Sutton on January 30, 2003 that the Fifth Circuit had already issued its final ruling and that no briefing schedule would be ordered. *See* Appendix C.

REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted and this Case Remanded for a Briefing Schedule to Be Ordered for Petitioner's Appeal from the Denial of His Motion for New Trial for Newly Discovered Evidence.

The issues presented in this petition are of far-reaching and national importance. This petition's essential question asks this Court to give definition to the expression, "meaningful appellate review." The answer to be given affects not only the appellate practice of an entire federal circuit, it also has a significant impact on every federal criminal appeal in this country. By rejecting appellant's appeal of right along with his discretionary appeal, the Fifth Circuit Court of Appeals essentially truncated the procedural

avenues available to Petitioner following the district court's denial of his motion for a new trial.

Review and jurisdiction in this Court are appropriate because the practice of the Fifth Circuit Court of Appeals departs from Federal Rules of Criminal Procedure and conflicts with the applicable decisions of this Court. Sup. Ct. R. 10(a),(c). The specific issue raised is an important question of federal law that this Court has not settled or addressed. Sup. Ct. R. 10(c).

Petitioner's motion for new trial was part of his underlying criminal case (H-CR-167-8) and was authorized by Rule 33 (b)(1), Federal Rules of Criminal Procedure. The denial of that motion, a final order, is made appealable as a matter of right by Rules 3 and 4 (b)(1)(A)(i), Federal Rules of Appellate Procedure. *See also* 28 USC §1291. That appeal must generally be filed within 10 days of the entry of judgment, and it was clearly with the intent of perfecting the appeal of this issue that Petitioner filed his initial Notice of Appeal in this case on the tenth day after the court's judgment. As is further provided by the Rules, that time was extended an additional 30 days in order to clarify the extent of the matters that Petitioner was challenging on appeal.

Had Petitioner only appealed from the motion for new trial, there is no question that his case would have been assigned a briefing schedule and that he would have been entitled to have the circuit consider the case on the basis of an opening (either of 30 pages or 14,000 words) and reply brief(15 pages or 7,000 words). *See* Rules 28 (a) and (c) and 32 (a)(7) (A) and (B), Federal Rules of Appellate Procedure. In addition, Petitioner should have had the right to request

oral argument with the presumption that oral argument would be granted. Rule 34, (a)(1) and (2), Federal Rules of Appellate Procedure. An appeal as a matter of right is decided by a three judge panel of the Circuit.

There was no legal basis by which this nondiscretionary appeal from a final judgment in a criminal case should have been affected by the incidental and separate appeal from Petitioner's distinct motion pursuant to 28 USC §2255, which was a civil filing that was docketed under a different civil case number (H-CV-3110). As a civil matter, the time to seek an appeal from this judgment was 60 days after entry of judgment or the order appealed from.[2/] *See* Rule 4 (a)(1)(B), Federal Rules of Appellate Procedure (when the United States is a party). Rather than wait 60 days, however, Petitioner sought to appeal all of the court's orders, which had been combined in a single judgment, within the 10-day filing period for a criminal appeal. In contrast to a motion for new trial for newly discovered evidence, an appeal from the denial of a motion under 28 USC §2255 is not as a matter of right; instead, it can be entertained only with permission of a Judge of the District Court, Court of Appeal, or this Court. *See* 28 USC §2253 (b). A request for a certificate of appealability in the Circuit is a motion limited to 20 pages (Rule 27 (d)(2),

---

[2/] There was no need for the District Court to allow leave to file an amended notice of appeal if the District Court felt that the appeal was only from the denial of the motion pursuant to 28 USC §2255, and that motion was dispositive of everything, as the amended notice of appeal was lodged (on the 35th day, July 12, 2002) with the District Court well within the 60 days to file a notice of appeal from the denial of a 28 USC §2255 motion.

Federal Rules of Appellate Procedure), contains no provision for oral argument and may be decided by a single Circuit Judge.[3/] *See* Fifth Circuit Rule 27.2.3.

In this petition, Mr. Abrego contends that due process demands that an appeal of right be afforded a full briefing and full consideration in the way of oral argument and diligent and conscientious review by three circuit judges. Whatever procedures are sufficient for a second attempt to secure a certificate of appealability for a separate matter calling for discretionary review, these lesser standards cannot be bootstrapped into obviating a meaningful appeal of right when one is guaranteed to petitioner by statute. By entering what amounted to a summary rejection of Petitioner's contentions, the Fifth Circuit essentially treated the merits of Petitioner's motion for new trial and its appeal as an exercise in futility. At least as troubling is the fact that the procedures relied on, which permit a clerk to reject a nondiscretionary appeal on the basis of the denial of a certificate of appealability from a separate order, are nowhere described in the Federal Rules or the rules of the circuit. As presently

---

[3/] For the substantive differences between the motions*see United States v. Prescott*, 221 F. 3d 686, 688-689 (4th Cir. 2000). Further, the motions are reviewed on appeal by different standards in the Fifth Circuit. *Cf. United States v. Burnes*, 668 F.2d 855 (5th Cir. 1982)(Rule 33 denial reviewed for abuse of discretion) and *United States v. Alvarado*, 898 F.2d 987, 994 (5th Cir. 1991)(same), with *United States v. Willis*, 273 F.3d 592, 595 (5th Cir. 2001)(district court's findings of fact in denying a 2255 motion are reviewed for clear error and questions of law are reviewed *de novo*).

construed, an appellant can only guess what course of action will preserve the merits of an appeal for meaningful review.

Mr. Abrego was entitled to have his appeal as of right reviewed in a manner that was neither arbitrary nor capricious and reflected the principles of fundamental fairness that are embodied in the Due Process Clause of the Constitution. He can hardly perceive that this right was protected in light of the manner in which the Court disposed of his contentions.

This Court has long eschewed arbitrary procedures that have had the effect of cutting off a defendant's right to have a judgment reviewed on appeal. *Coppedge v. United States*, 369 U.S. 438 (1962). Analogous to the action taken on Petitioner's request for a certificate of appealablity, a petition to proceed in *forma pauperis* may be denied if the trial court certifies in writing that it is *not taken in good faith*. 28 USC §1915. While an appeal of right as to which there has no assertion of indigence and no request to waive fees is not subject to such "pre-screening," the granting of a certificate of appealability in a habeas case is a matter of pre-screening the merits of the issues raised by an appeal. Inasmuch as the Fifth Circuit has apparently used Petitioner's request for a certificate of appealability for the §2255 issues as a means to pre-screen his appeal of right, its action must, at a minimum, comport with previous authority of this Court, which has held that a determination as to the good faith of an appeal, which is sought to be taken in *forma pauperis*, cannot be used as a substitute for a determination of the appeal on its merits. Id.

This Court held that only the most frivolous appeals would be found to not meet the test of good faith. "[U]nless the issues raised (by the indigent seeking leave to appeal in

forma pauperis) are so frivolous that the appeal would be dismissed in the case of a nonindigent litigant, Fed. Rules Crim. Proc. 39(a), 18 U.S.C.A., the request of an indigent for leave to appeal in *forma pauperis* must be allowed." Id. at 447, 82 S.Ct. at 922 (quoting *Ellis v. United States*, 356 U.S. 674, 675, 78 S.Ct. 974, 975, 2 L.Ed.2d 1060 (1958)). Such a determination could only be made by an appellate court if, after appointing counsel and providing counsel with a record of sufficient completeness to enable counsel to attempt to make a showing, the appellate court was satisfied that the district court's finding of a lack of "good faith" was not in error. Id. at 445-446, 82 S.Ct. at 921-22; *see also Hardy v. United States*, 375 U.S. 277 (1964), Justice Goldberg concurring, at pp. 284-286.

However, the pleadings submitted to overcome a finding of lack of "good faith" and the ruling thereon was specifically determined by this Court as not being the equivalent of receiving a determination on the merits of the appeal.

> "Contrary to the Government's assertion here that petitioner has already received what amounts to plenary review of the conviction following his second trial, we hold petitioner has not yet received the benefits of presenting either oral argument or full briefs on the merits of his claims to the court first charged with the supervision of the trial court. n.18 The memoranda prepared by counsel in support of petitioner's application for leave to appeal in forma pauperis were not intended to be, nor are they rightly considered as, full appellate briefs. But they do serve to demonstrate that petitioner sought consideration of issues that it would be difficult for an appellate court

to consider so patently frivolous as to require a dismissal of petitioner's case without full briefing or argument." (Footnote omitted.)

Coppedge v. United States, *supra*, 369 U.S. at pp. 452-453. See also the concurring opinion of Justice Stewart, joined by Justice Brennan, *Ibid.* 369 U.S. at 456-457.[4/] Certainly, it cannot be said that there is anything patently frivolous about Petitioner's having newly discovered the perjury and bias of the lead witness against him and alleging that the government was a party to that perjury. The procedure by which an

---

4/ "The result is that a Court of Appeals may come to think of these preliminary proceedings as tantamount to appeals on the merits, and may tend to decide whether or not to grant leave to appeal by appraising the entire case in terms of whether or not reversible error appears. By the same token, when leave to appeal has been denied, and the case has come here, the Government has argued in the past, as it argues in this case, that the preliminary screening procedure was itself the equivalent of an affirmance on the merits. *See Lurk v. United States*, 366 U.S. 712. ¶ This attempted conversion of the proceedings to determine good faith into a truncated substitute for appeal distorts the purpose of § 1915, and, if accepted, would raise serious questions of due process. The filing of memoranda in support of an application for leave to appeal is not an appeal. The merits of the ultimate issues are not logically involved at this point, but only the weight of those issues. Appellate briefs are not written or submitted. There is no oral argument. The court's mode of considering such memoranda, as a matter of internal machinery, may markedly differ from the process employed in the decision of cases actually on appeal. For all these reasons the interim proceeding permitted by § 1915 cannot itself be deemed to constitute the appeal to which a person convicted of crime in the federal courts is entitled."

indigent defendant overcomes a finding of lack of "good faith" is similar to that is necessary to obtain a certificate of appealability when there has been no decision on the merits of the petition. In such a case, the certificate should issue as to the merits so long as the petition states a valid claim of the denial of a constitutional right. Cf. *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 1604 (2000); 28 USC §2253.

As pointed out in *Coppedge v. United States*, *supra*, 369 U.S. at p. 440, fn.1, this Court had good reason for insisting on plenary review for cases that were to be appealed as a matter of right. In the previous five Terms, it had already found it necessary in 14 cases to vacate and remand because the Court of Appeals had applied erroneous standards in passing on an indigent's application for leave to appeal. This Court cited a number of instances in which appeals had resulted in reversals of convictions after leave to appeal in *forma pauperis* had initially been denied by the district court. *Ibid.* at p. 459 n.16 (citing *Jones v. United States*, 105 U.S.App.D.C. 326, 328, 266 F.2d 924, 926 (1959) (reversal ordered in 11 of 24 cases in which leave to proceed *in forma pauperis* was initially denied)).

In *Slack v. McDaniel*, *supra*, this Court concluded the pre-1996 standard, set forth in *Barefoot v. Estelle*, 463 U.S. 880 (1983), for issuing a certificate of probable cause was the same standard to be applied for issuing a certificate of appealability and that to obtain a certificate of appealability, the moving party need only demonstrate that "reasonable jurists could debate (or for that matter agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" (*Slack v. McDaniel*, *supra*, 529 U.S. at p.

484.) This Court rejected the conclusion by the Court of Appeals that a higher standard was necessary to obtain a certificate of appealability. Further, this Court required a certificate of appealability to issue, even though one had previously been denied by the District Court and the Court of Appeals. *McDaniel* again demonstrates the weakness of "pre-screening" review. In this case, it has denied Petitioner the full briefing and oral argument to which he is entitled, as a matter of right, not discretion. *Coppedge* and *McDaniel* clearly refute the contention made by government's argument below that a ruling on whether to issue a certificate of appealability suffices to constitute a decision on the merits of an appeal.

Nonetheless, *Coppedge* and *McDaniel* address only the issue of how a court should exercise its discretion to grant or deny review. Petitioner, however, is not challenging the Fifth Circuit's decision to reject his discretionary appeal of his 28 USC §2255 motion. As set forth above, the absence of a certificate of appealability has nothing to do with Petitioner's right to an appeal from the denial of his motion for a new trial. Unlike his petition for §2255 relief, Petitioner had a due process and equal protection right to receive a full briefing on the merits and the opportunity for oral argument. It cannot be that the mere fact that Petitioner also had pending a discretionary appeal under 28 USC §2255 could defeat what was otherwise his appeal as of right from the denial of his motion for new trial.

This is made clear under cases dealing with the requirements imposed on States when the States elect to allow appeals as a matter of right. While States are not required to provide for appeals as a matter of right (*see McKane v.*

Durston, 153 U.S. 684, 687 (1894), concluding States not required to allow an appeal as a matter of due process), once States allow such appeals, the States are restricted by the "due process" and "equal protection" clauses of the Fourteenth Amendment as to what they can and cannot do. *See Evitts v. Lucey*, 469 U.S. 387 (1985); *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956).

The federal criminal appellate system allows an appeal as a matter of right. *Hardy v. United States*, *supra*, 375 U.S. at p. 278. Therefore, as with States, this right can not be arbitrarily denied. While the Fourteenth Amendment does not by its terms apply to the Federal Government, the Fifth Amendment contains a "Due Process" clause, as does the Fourteenth Amendment, and the concept of equal protection of the laws is incorporated into the "Due Process" clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954). Therefore, cases requiring nondiscriminatory action with regards to State appeals are also applicable to appeals as a matter of right in the federal system. These cases demonstrate that Petitioner has been denied due process and equal protection of the law when his appeal as a matter of right was denied because he did not obtain a certificate of probable cause to obtain discretionary leave to appeal the denial of his motion under 28 USC §2255 appeal. [5/]

[5/] For a discussion of the constitutional difference between appeals as a matter of right and appeals as a matter of discretion, *see Ross v. Moffitt*, 417 U.S. 600 (1974), discussing whether states needed to appoint counsel to represent an indigent in preparing a petition for certiorari.

When an appellant's right to obtain the appointment of counsel in an appeal as a matter of right requires him to "run a gauntlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure." (*Douglas v. California*, 372 U.S. 353, 357 (1963).) Likewise, the right to a have such an appeal heard cannot be restricted because of the mere coincidence of having combined it with a discretionary appeal. Such arbitrary procedures do not "comport with fair procedure" and amount to a denial of due process of law and equal protection of the laws. Surely the federal appellate system, like the state appellate system, must be "free of unreasoned distinctions." (*See Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966).) To prohibit this Petitioner from proceeding with his appeal as a matter of right, merely because he could not pursue another separate appeal, clearly constitutes such an "unreasoned distinction." *See also Evitts v. Lucey*, 469 U.S. 387, 399-404[9] (1985).

Based upon the foregoing, certiorari should be granted and this matter remanded to the United States Court of Appeals for the Fifth Circuit for a briefing schedule to be set for Petitioner's appeal from the denial of his motion for new trial.

---

[9] "A system of appeal as of right is established precisely to assure that only those who are validly convicted have their freedom drastically curtailed. A State may not extinguish this right because another right of the appellant -- the right to effective assistance of counsel -- has been violated."

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the decision of the United States Court of Appeals for the Fifth Circuit, effectively denying Petitioner his appeal as a matter of right from the denial of his motion for new trial for newly discovered evidence, because a certificate of appealability did not issue in a related discretionary appeal from the denial of a motion pursuant to 28 USC §2255. It is submitted that under these facts Petitioner was denied his right to due process of law and equal protection of the law, as guaranteed by the Fifth Amendment to the United States Constitution, when he was treated differently than any other individual seeking relief from the denial of a motion of new trial for newly discovery evidence and subjected to a "pre-screening" procedure that did not allow for a full brief on the merits of his claim, or an opportunity for oral argument.

Respectfully submitted,

Michael Pancer*
105 West "F" Street
San Diego, CA 92101
(619) 236-1826

Robert J. Waters
2115 Main Street
Santa Monica, CA 90405
(310) 399-3259

Counsel for Petitioner
Juan Garcia Abrego

*Counsel of Record